

1 Mark S. Eisen (SBN - 289009)
2 meisen@edelson.com
3 EDELSON PC
4 555 West Fifth Street, 31st Floor
5 Los Angeles, California 90013
6 Tel: 213.533.4100
7 Fax: 213.947.4251

8 Jay Edelson (Admitted *Pro Hac Vice*)
9 jedelson@edelson.com
10 Rafey S. Balabanian (Admitted *Pro Hac Vice*)
11 rbalabanian@edelson.com
12 Benjamin S. Thomassen (Admitted *Pro Hac
13 Vice*)
14 bthomassen@edelson.com
15 Amir Missaghi (Admitted *Pro Hac Vice*)
16 amissaghi@edelson.com
17 EDELSON PC
18 350 North LaSalle Street, Suite 1300
19 Chicago, Illinois 60654
20 Tel: 312.589.6370
21 Fax: 312.589.6378

22 Attorneys for Plaintiff
23 JOSHUA SMITH

24 Tod L. Gamlen, State Bar No. 83458
25 tod.gamlen@bakermckenzie.com
BAKER & MCKENZIE LLP
660 Hansen Way
Palo Alto, CA 94304
Telephone: +1 650 856 2400
Facsimile: +1 650 856 9299

26 Teresa H. Michaud, State Bar No. 296329
27 teresa.michaud@bakermckenzie.com
28 Christina M. Wong, State Bar No. 288171
christina.wong@bakermckenzie.com
BAKER & MCKENZIE LLP
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111-3802
Telephone: +1 415 576 3022
Facsimile: +1 415 576 3099

29 Mark D. Taylor (Admitted *Pro Hac Vice*)
30 mark.taylor@bakermckenzie.com
BAKER & MCKENZIE LLP
31 2300 Trammell Crow Center
32 2001 Ross Avenue
33 Dallas, TX 75201
34 Telephone: +1 214 978 3000
35 Facsimile: +1 214 978 3099

36 Attorneys for Defendants
37 PEGATRON USA, INC., ASROCK
38 AMERICA, INC., and FATALITY, INC.,
39 d/b/a FATALITY, INC.

40 UNITED STATES DISTRICT COURT
41
42 NORTHERN DISTRICT OF CALIFORNIA
43
44 SAN FRANCISCO DIVISION

45 JOSHUA SMITH, individually and on
46 behalf of all others similarly situated,

47 Plaintiff,

48 v.

49 PEGATRON USA, INC., a California
50 corporation, ASROCK AMERICA, INC., a
51 California corporation, and FATALITY, INC.,
52 d/b/a Fatal1ty, Inc., a Missouri corporation,

53 Defendants.

54 Case No. 3:14-cv-01822-CRB

55 Hon. Charles R. Breyer

56 **JOINT CASE MANAGEMENT
57 STATEMENT**

58 First Amended Complaint Filed:
59 July 3, 2014

1 Pursuant to Fed. R. Civ. P. 26, Local Rule 16–9 and the Standing Order for all Judges of the
 2 Northern District of California, Plaintiff Joshua Smith (“Plaintiff”) and Defendants Pegatron USA,
 3 Inc. (“Pegatron USA”), ASRock America, Inc. (“ASRock America”), and Fatality, Inc., d/b/a
 4 Fatal1ty, Inc., (“Fatal1ty”) (collectively, “Defendants,” and collectively with Plaintiff, the “Parties”),
 5 hereby jointly submit the following Case Management Statement.

6 **I. JURISDICTION AND SERVICE**

7 Plaintiff alleges that this Court has subject matter jurisdiction over this action pursuant to 28
 8 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of a state
 9 different from Defendants, (b) the alleged amount in controversy exceeds \$5,000,000, exclusive of
 10 interest and costs, and (c) none of the exceptions under that subsection apply to this action.

11 Defendants deny that both Plaintiff and the purported class he seeks to represent have been damaged
 12 in the amount of \$5,000,000 or in any amount or at all and reserve all rights as to subject matter
 13 jurisdiction. The currently named Defendants have been served and no issues exist with respect to
 14 personal jurisdiction or venue as to the currently named Defendants.

15 **II. FACTS**

16 **A. Plaintiff’s Position:** Together, Defendants develop, manufacture, market, and sell (or
 17 cause to be sold) a line of motherboards to consumers—specifically, “a range of motherboards
 18 specifically designed for PC gaming enthusiasts” under the “ASRock Fatal1ty” name. This case
 19 centers on aspects of Defendants’ marketing, which specifically misrepresents the technical
 20 capabilities of the subject ASRock Fatal1ty motherboards. Namely, Defendants make
 21 representations that their products can increase network speeds and performance “5X” on
 22 consumers’ PCs, reduce latency in online games by up to “136%,” “triple” a user’s graphics card’s
 23 performance, and that all these representations were “proven by experiments.” However,
 24 Defendants’ promises are greater than the sum of their parts: *none* of these representations can be
 25 obtained by the ASRock Fatal1ty motherboards sold by Defendants. Had Defendants’ customers—
 26 including Plaintiff—known that Defendants’ advertising was not true, they would not have
 27 purchased the products or, at the very least, would have paid less money for them.

28 **B. Defendants’ Position:** Each of the claims in this action arise out of four (4)

1 advertising statements that were used for a short period of time in connection with four (4) models of
 2 the ASRock Fatal1ty line of motherboards. Such advertising statements appeared either on the
 3 product packaging of the motherboard or on certain website pages hosted by third parties. None of
 4 the three named Defendants -- Pegatron USA, ASRock America or Fatal1ty -- played any role in the
 5 design, development, or production of the motherboards and played no role in the four advertising
 6 statements at issue. At all times the ASRock Fatal1ty motherboards were designed, developed, and
 7 produced by non-party ASRock, Inc., a Taiwanese corporation located in Taiwan. Nevertheless,
 8 Defendants dispute that any of the four advertising statements were false or misleading, and reserve
 9 all rights to raise defenses in regard to the statements. Notably, the advertising statements were used
 10 for only a short period of time and the number of the subject ASRock Fatal1ty motherboards sold to
 11 third party distributors in the United States is small, amounting to less than 13,000; the number sold
 12 by those third party distributors to customers is unknown, but is presumably much less.

13 **III. LEGAL ISSUES**

14 The legal issues in this case include, but are not limited to:

- 15 1. The role (if any) that any of the currently named Defendants – Pegatron USA, ASRock
 16 America or Fatal1ty -- played in the creation or development of the four advertising
 17 statements at issue or the underlying motherboards to which they relate and whether, based
 18 on that role, said Defendants can be held liable as Plaintiff alleges.
- 19 2. Whether Defendants intentionally misrepresented the features of the ASRock Fatal1ty line of
 20 motherboards, and the nature of that misrepresentation (e.g., whether it was material);
- 21 3. Whether Defendants' conduct was willful;
- 22 4. Whether Defendants' conduct constitutes a violation of California's Consumers Legal
 23 Remedies Act (Cal. Civ. Code. §§ 1750, *et seq.*); Unfair Competition Law (Cal. Bus. & Prof.
 24 Code §§ 17200, *et seq.*); False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*);
- 25 5. Whether Defendants' conduct constitutes fraud in the inducement; breach of express
 26 warranties; and whether Defendants have been unjustly enriched;
- 27 6. Whether this action is suitable for class action treatment under Fed. R. Civ. P. 23.
- 28 7. Whether any actions taken by Defendants caused damage to Plaintiff or any member of the

1 putative class: and, the measures and/or method(s) to calculate such purported damages.

2 **IV. MOTIONS**

3 To date, Defendants have filed two motions to dismiss under Rule 12(b)(6)—one in response
 4 to Plaintiff's original complaint, (Dkt. 29), and one in response to Plaintiff's First Amended
 5 Complaint, (Dkt. 36). The Court denied Defendants' second motion to dismiss on September 23,
 6 2014. (Dkt. 42.) No other substantive motions have been filed.

7 Plaintiff anticipates filing the following motions in this action: (i) a motion for class
 8 certification; (ii) a motion for summary judgment; and (iii) discovery-related motions, if necessary.

9 Defendants anticipate opposing the motions referred to above and anticipate filing the
 10 following additional motions in this action: (i) motion(s) for summary judgment and/or partial
 11 summary judgment; (ii) discovery related motions , including motions for protective orders to limit
 12 the scope of discovery that can be taken of the three named Defendants; and (iii) any necessary
 13 *Daubert* motion to strike class certification or substantive experts.

14 **V. AMENDMENT OF PLEADINGS**

15 **A. Plaintiff's Position:** At this time, Plaintiff does not anticipate that any additional
 16 amendments of the pleadings will be necessary. However, information obtained through discovery
 17 may necessitate amendments in the future. If information demonstrates that ASRock, Inc. is a
 18 necessary party to this case, then Plaintiff will, of course, amend. Likewise, Plaintiff has invited
 19 Defendants to demonstrate their lack of involvement in the advertising statements at issue (as he did
 20 before the First Amended Complaint was filed in this matter). And if such information demonstrates
 21 that one or more Defendants do not belong in this case, then Plaintiff will amend. But there is no
 22 need to stay or otherwise delay this case—amended pleadings (if any) should be filed in accordance
 23 with the proposed schedule of discovery and general case deadlines set forth in Section XVII below.

24 **B. Defendants' Position:** The currently named Defendants maintain that it was non-party
 25 ASRock, Inc. -- not Defendants -- that designed, developed and produced the motherboards at issue
 26 in this case, created the advertising statements at issue, placed the advertising on the product
 27 packaging, and hosted and owned the website on which the statements appeared. Plaintiff has been
 28 made aware of these facts in writing and at the parties' Rule 26(f) conference. Defendants believe

1 that Plaintiff should be given a date certain to add ASRock, Inc. as a defendant and if he does not do
 2 so, Plaintiff should be precluded from doing so in this action. And, that the further scheduling in
 3 this case should be postponed until such date.

4 **VI. EVIDENCE PRESERVATION**

5 The Parties have conferred with their respective counsel about the need to preserve evidence
 6 that may be relevant to Plaintiff's claims or Defendants' defenses, including the preservation of
 7 electronically stored information. The parties have taken such steps as necessary under the Federal
 8 Rules and Local Civil Rules to preserve evidence and put a litigation hold on relevant documents,
 9 including electronically stored information and material, including electronic data (e.g., emails,
 10 voicemails, and other electronically recorded material). In the event that any issue arises as to
 11 evidence preservation, the parties shall meet and confer; and, if necessary, seek Court assistance.

12 **VII. DISCLOSURES**

13 The Parties will exchange their respective Rule 26(a)(1) disclosures by October 31, 2014.

14 **VIII. DISCOVERY**

15 **A. Scope of Discovery**

16 **1. Plaintiff's Position:** Plaintiff anticipates propounding discovery on the following
 17 non-exhaustive list of topics: (1) information related to the design, manufacturing, "experiments"
 18 conducted with respect to the ASRock Fatal1ty line of motherboards, including each Defendant's
 19 role in those processes; (2) information related to the design, distribution, and use of advertisements
 20 for the ASRock Fatal1ty line of motherboards, including each Defendant's role in those processes;
 21 (3) information concerning sales and/or distribution of the ASRock Fatal1ty line of motherboards in
 22 the United States, and all monies derived therefrom; and (4) information concerning Defendants'
 23 relationship and communications with members of the putative class (e.g., complaints received, etc.).

24 **2. Defendants' Position:** If Plaintiff intends to pursue the discovery referred to above,
 25 particularly (1) and (2), ASRock, Inc., should be added as a defendant. Unless and until ASRock,
 26 Inc., is added as a Defendant, discovery should be limited to the role, or lack thereof, of each of the
 27 named Defendants in the design, manufacturing, "experiments"/testing of the ASRock Fatal1ty
 28 motherboards at issue and/or the named Defendants' role, or lack thereof, in the design, distribution

1 and use of the four advertising statements at issue.

2 Defendant intends to take discovery of Plaintiff and other discovery related to class
 3 certification issues.

4 **B. Phased Discovery:**

5 **1. Plaintiff's Position:** Plaintiff believes that the phasing of discovery is unnecessary in
 6 this matter beyond the proposed schedule set forth in Section XVII below. If Defendants produce
 7 evidence demonstrating that all or some of them played a limited (or no) role with respect to the
 8 subject motherboards, then Plaintiff will seek to amend and conduct discovery accordingly. But
 9 there's no need to "phase" discovery as Defendants suggest, as the topics Plaintiff proposes for
 10 discovery in this matter are undeniably relevant to his claims (and if Defendants have nothing to
 11 produce, for example, then responding will be a trivial matter). And if the case is truly "small," as
 12 Defendants suggest above, then Plaintiff believes that focusing on a potential resolution of this
 13 matter is a more efficient use of time than creating additional and drawn-out "phases" of discovery.

14 **2. Defendants' Position:** Defendants maintain that unless and until ASRock, Inc., is
 15 named as a defendant discovery should be limited, or "phased" as follows: **Phase 1** -- Discovery
 16 should be limited to the role, or lack thereof, of each of the named Defendants in the design,
 17 manufacturing, "experiments"/testing of the ASRock Fatal1ty motherboards at issue and/or the
 18 named Defendants' role, or lack thereof, in the design, distribution and use of the four advertising
 19 statements at issue. **Phase 2** -- Only if discovery in Phase 1 produces evidence that any of the named
 20 defendants played any role as described above, should Plaintiff be allowed to take any further
 21 discovery, including discovery relating to class certification.

22 **C. Form of Electronic Discovery and Claims of Privilege:** The Parties are still in
 23 discussions, including concerning the crafting an appropriate stipulation (or stipulations), subject to
 24 the Court's approval, governing: (1) the identification of relevant and discoverable ESI; (2) the
 25 scope of discoverable ESI to be preserved and produced by the Parties; (3) the formats for
 26 preservation and production of ESI; (4) the protection of confidential and proprietary information;
 27 (5) the procedures for handling inadvertent production of privileged information and other privilege
 28 waiver issues under Rule 502 of the Federal Rules of Evidence; and (6) any other relevant ESI issues

1 that may arise in this case.

2 **IX. CLASS ACTIONS**

3 **A. Plaintiff's Position:** Plaintiff seeks class certification pursuant to Fed. R. Civ. P.
 4 23(b)(3) of a class of similarly situated individuals and entities, defined as: "All individuals and
 5 entities in the United States that purchased an ASRock Fatal1ty Z87 Killer, 990FX Killer, B85
 6 Killer, or FM2A88X+ Killer motherboard."

7 The proposed Class satisfies each of the requisites to class certification under Rule 23(b)(3).
 8 In particular, the Class consists of likely thousands of individuals, making joinder of all members
 9 impracticable (numerosity). There are many questions of law and fact common to Plaintiff's claims
 10 and those of the other members of the Class, which predominate over any questions that may affect
 11 only individual Class members (commonality and predominance). To that end, Plaintiff refers to the
 12 briefing on Defendants' second motion to dismiss. There, Plaintiff detailed the many connections
 13 this matter has to the state of California, which justify the extraterritorial application of California
 14 law. Likewise, Defendants' representations were made on the motherboards' product packaging (to
 15 which the entire class was necessarily exposed) and utilized promises that were objectively false.
 16 Under such facts, questions of individual reliance are no barrier to certification, and resolution of
 17 whether Defendants' uniform conduct was material and misleading will be resolved on an objective
 18 basis—making this case eminently suitable for class-wide adjudication. Accordingly, Plaintiff's
 19 claims are also typical of the claims of all of the other members of the Class, inasmuch as Plaintiff
 20 and the Class sustained damages as a result of Defendants' uniform wrongful conduct in
 21 disseminating false advertisements and misleading marketing materials to Plaintiff and the Class
 22 (typicality); and Plaintiff will fairly and adequately represent and protect the interests of the other
 23 members of the Class, and has retained counsel competent and experienced in complex class actions
 24 involving issues of nation-wide consumer fraud (adequacy of representation).

25 Similarly, class proceedings are superior to all other available methods for the fair and
 26 efficient adjudication of this controversy. That is, the damages suffered by individual Class members
 27 (i.e., around \$100 - \$200 each) will be relatively small compared to the burden and expense of
 28 individual prosecutions. Even if members of the Class could sustain such individual litigation, it

1 would still not be preferable to a class action, because individual litigation would increase the delay
2 and expense to all parties, as well as the likelihood of the imposition of inconsistent obligations.
3 Moreover, Defendants have acted or refused to act on grounds generally applicable to the Class,
4 thereby making appropriate final restitutionary relief with respect to the Class as a whole.

5 **B. Defendants' Position:** Based on the facts currently available to them, Defendants
6 contend that this action cannot properly be certified as a class action. Most importantly, questions of
7 law and fact affecting individual putative class members will predominate over any questions that
8 may affect the entire putative class. Extraterritorial application of California law to Plaintiff's claims
9 is improper for a variety of reasons, including that Plaintiff is not a resident of California and did not
10 purchase his motherboard in California, many members of the nationwide putative class that he
11 purports to represent reside throughout the United States and have no connection to California
12 whatsoever, and the advertising statements at issue did not emanate from California or any of the
13 currently named Defendants. Plaintiff's purported class action necessarily invokes the application of
14 a number of different states' consumer and advertising laws making the case unsuitable for class
15 action treatment. In addition, this case would require a separate inquiry into the facts relating to
16 each putative class member, including, but not limited to, whether individual customers saw the
17 advertisements at issue, which advertisements customers saw, whether the customers relied on such
18 advertisements, whether and how the individual customers used the motherboards at issue, and the
19 specific levels of performance each customer was able to achieve. Notably, each of the products at
20 issue is merely one component of a personal computer system which must be connected and
21 configured with other components in order to build a working system. The configuration will most
22 certainly vary by the individual system into which the motherboard is built, and thereby vary by
23 class member. Thus, Plaintiff's claims relating to the performance he personally achieved would not
24 be the same as that of the other members of the putative class. Furthermore, because of the
25 uncommon questions of law and fact among putative class members, as well as their atypical claims,
26 each class member, including Plaintiff, may be subject to individual defenses that differ from the
27 remaining members of the class. Thus, Plaintiff cannot fairly and adequately represent and protect
28 the interests of the other members of the putative class. Defendants hereby reserve any and all rights

1 they may have to assert other objections and defenses to class certification in this action.

2 **X. RELATED CASES**

3 The Parties are unaware of any related cases at this time.

4 **XI. RELIEF SOUGHT**

5 **A. Plaintiff's Position:** Plaintiff respectfully requests that the Court enter an Order (or
 6 Orders): (i) certifying this case as a class action on behalf of the Class defined above, appointing
 7 Joshua Smith as representative of the Class, and appointing his counsel as class counsel; (ii)
 8 declaring that Defendants' actions, as set out above, violate the CLRA (Cal. Civ. Code §§ 1750, *et
 9 seq.*), the UCL (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), and the FAL (Cal. Bus. & Prof. Code §§
 10 17500, *et seq.*), and constitute fraud in the inducement, breach of express warranties, and unjust
 11 enrichment; (iii) awarding damages (i.e., in the amount Plaintiff and other consumers like him paid
 12 for Defendants' motherboards), including statutory and punitive damages where applicable, to
 13 Plaintiff and the Class in an amount to be determined at trial; (iv) awarding Plaintiff and the Class
 14 their reasonable litigation expenses and attorneys' fees; (v) awarding Plaintiff and the Class pre- and
 15 post-judgment interest, to the extent allowable; (vi) awarding such other injunctive and declaratory
 16 relief as is necessary to protect the interests of Plaintiff and the Class; and (vii) awarding such other
 17 and further relief as the Court deems reasonable and just.

18 **B. Defendants' Position:** Defendants maintain that (i) this action cannot properly be
 19 certified as a class action; and, (ii) neither Plaintiff nor the putative class is entitled to any relief
 20 against any of the named Defendants

21 **XII. SETTLEMENT AND ADR**

22 Counsel for the parties have engaged in some preliminary settlement discussions as part of
 23 the Rule 26(f) conference. Given the size of the case it is anticipated that the parties will pursue
 24 further discussions and will likely engage a mediator to assist in this regard.

25 **XIII. CONSENT TO MAGISTRATE JUDGE**

26 The Parties do not consent to proceed before a Magistrate Judge at this time.

27 **XIV. OTHER REFERENCES**

28 At this time, the Parties do not believe that this case is suitable for reference to binding

1 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

2 **XV. NARROWING OF ISSUES**

3 **A. Plaintiff Position.** At this time, and as described above, Plaintiff contends that there are
4 not any issues that can be narrowed by agreement or by motion, and does not presently request
5 bifurcation of issues, claims, or defenses.

6 **B. Defendants' Position.** Defendants contend that, unless and until ASRock, Inc., is added
7 as a defendant, the issue of their role, or lack thereof, in the design, manufacturing,
8 "experiments"/testing of the ASRock Fatal1ty motherboards at issue and/or their role, or lack
9 thereof, in the design, distribution and use of the four advertising statements at issue should be
10 determined. Defendants contend they had no such role and should not have to incur the expense of
11 discovery addressing issues in which they played no role.

12 **XVI. EXPEDITED SCHEDULE**

13 **A. Plaintiff's Position:** Plaintiff believes that the proposed schedule set forth in the
14 table below should be adopted by the Court.

15 **B. Defendants' Position:** Defendants contend that the Court should not set a schedule unless
16 and until ASRock, Inc., is added as a defendant; or, until such time as Plaintiff is precluded from
17 adding ASRock, Inc. as a defendant. In the event that the Court does decide to set a schedule at this
18 time, the proposed schedule set forth below should be adopted by the Court.

19 **XVII. SCHEDULING**

20 EVENT	21 PROPOSED DEADLINES
22 <i>Deadline to file motions to join parties or amend pleadings</i>	23 January 30, 2015
24 <i>Plaintiff to serve disclosures pursuant to Fed. R. Civ. P. 26(a)(2) relating to class certification</i>	25 February 27, 2015
26 <i>Defendants to serve disclosures of rebuttal expert witnesses and reports relating to class certification</i>	27 April 30, 2015
28 <i>Defendants' deadline to depose Plaintiff's experts and the Parties' other witnesses related to class certification</i>	May 7, 2015
<i>Plaintiff's deadline to depose rebuttal experts related to class certification</i>	June 8, 2015
<i>Plaintiff to file motion and memorandum in support of class certification</i>	July 9, 2015

1	<i>Defendants to file opposition to class certification and all supporting materials</i>	August 10, 2015
2	<i>Plaintiff to file reply in support of motion for class certification</i>	August 24, 2015
3	<i>Hearing on motion for class certification</i>	At the Court's convenience.
4	<i>Fact discovery cut-off</i>	90 days following the Court's ruling on Plaintiff's motion for class certification
5	<i>Plaintiff to serve disclosures pursuant to Fed. R. Civ. P. 26(a)(2) related to merits issues</i>	30 days prior to fact discovery cut-off
6	<i>Defendants to disclose rebuttal expert witnesses related to merits issues</i>	45 days following Plaintiff's expert disclosures related to merits issues
7	<i>Defendants to depose Plaintiff's experts related to merits issues</i>	45 days following Plaintiff's expert disclosures related to merits issues
8	<i>Plaintiff to depose Defendants' rebuttal expert witnesses related to merits issues</i>	45 days following Defendants' disclosures of rebuttal experts related to merits issues
9	<i>Expert discovery cut-off</i>	45 days following Defendants' disclosures of rebuttal experts related to merits issues
10	<i>File dispositive pretrial motions and Daubert motions</i>	45 days following the close of expert discovery
11	<i>File oppositions to dispositive pretrial motions and Daubert motions</i>	30 days following filing of any dispositive pretrial motions or Daubert motions
12	<i>File reply briefs in support of dispositive pretrial motions and Daubert motions</i>	14 days following filing of any opposition to dispositive pretrial motions or Daubert motions
13	<i>Hearing on dispositive pretrial motions and Daubert motions</i>	At the Court's convenience
14	<i>Pretrial conference</i>	TBD
15	<i>Motion in limine hearing date</i>	TBD
16	<i>Trial to begin</i>	TBD
17		

XVIII. TRIAL

Plaintiff has requested a trial by jury of all matters that can be so tried. Plaintiff anticipates that a trial in this matter will require approximately eight Court days.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

On April 23, 2014, Plaintiff's counsel filed their certificate of interested entities or persons. (Dkt. 6.) On May 15, 2014, Defendants ASRock and Pegatron filed their certificate of interested entities or persons. (Dkt. 20.)

XX. OTHER MATTERS

At this time, the Parties are unaware of any other matters that may facilitate the just, speedy, and inexpensive disposition of this action.

1 * * *

2 Respectfully submitted,

3 Dated: October 31, 2014 BAKER & McKENZIE LLP

4 By: /s/ Tod L. Gamlen

5 Tod L. Gamlen
6 tod.gamlen@bakermckenzie.com
BAKER & McKENZIE LLP
7 660 Hansen Way
Palo Alto, CA 94304
Telephone:+1 650 856 2400

8 Attorneys for Defendant
9 PEGATRON USA, INC., ASROCK AMERICA,
INC., and FATALITY, INC., d/b/a FATAL1TY,
INC..

10 Dated: October 31, 2014 EDELSON PC

11 By: /s/ Benjamin Scott Thomassen

12 Benjamin S. Thomassen (Admitted Pro Hac Vice)
bthomassen@edelson.com
13 EDELSON PC
14 350 North LaSalle Street, Suite 1300
Chicago, Illinois 60654
15 Tel: 312.589.6370
Fax: 312.589.6378

16 Attorneys for Plaintiff
17 JOSHUA SMITH

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SIGNATURE ATTESTATION

Pursuant to Civil Local Rule 5.1(i)(3), I hereby attest that concurrence has been obtained in the filing of this document from each of the other signatories shown above.

Dated: October 31, 2014

By: /s/ Benjamin S. Thomassen